



EMERGENCY COMMITTEE FOR AMERICAN TRADE

TESTIMONY OF CALMAN J. COHEN

PRESIDENT OF THE

EMERGENCY COMMITTEE FOR AMERICAN TRADE

BEFORE

THE SUBCOMMITTEE ON COMMERCE, TRADE AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

OF THE U.S. HOUSE OF REPRESENTATIVES

ON

CFIUS Reform: H.R. 5337, The Reform of National Security Reviews of Foreign Direct Investments Act

July 11, 2006

**SUMMARY OF TESTIMONY OF CALMAN J. COHEN
PRESIDENT OF THE EMERGENCY COMMITTEE FOR AMERICAN TRADE (ECAT)**

- The United States' national security is strengthened by promoting a vibrant economy and economic growth here at home and abroad, which in turn are fostered by foreign investment into the United States, as well as U.S. investment abroad. Foreign investment inflows into the United States are a major source of U.S. economic growth, as is U.S. investment abroad. Continued foreign investment in the United States and its corollary, U.S. investment abroad, require policies that support and protect foreign investment.
- CFIUS plays an important role in ensuring that the United States continues to welcome investment and its reform makes sense to ensure a credible, objective and strong process focused on national security. ECAT and several other major business associations have laid out a number of key principles that need to be achieved through the CFIUS reform process.
- In particular, reform must ensure that limited CFIUS resources are directed at potential transactions that raise national security issues, rather than diverting resources to mandatory investigations, regardless of any national security nexus. It must also consider potential changes to the U.S. national security review process in light of how such an altered process would impact U.S. investors abroad if similar changes were adopted by foreign governments.
- Overall, H.R. 5337 would establish a strong framework for CFIUS to review, make decisions and notify Congress on the national security implications of foreign investments in a way that emphasizes an objective, timely and fact-based process that promotes national security objectives, while promoting continued support for investment here in the United States.
- Improvements are possible in a few areas, but efforts must be made to avoid proposals that would overwhelm the CFIUS process; effectively downgrade the use of sensitive, classified and business confidential through per se judgments, politicize the process or chill foreign investment.

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Mr. Chairman, Congresswoman Schakowsky, Members of the Committee, I welcome the opportunity to appear before you today to express support for H.R. 5337, the Reform of National Security Reviews of Foreign Direct Investments Act, of 2006, on behalf of the Emergency Committee for American Trade (ECAT). ECAT is an association of the chief executives of major American companies with global operations who represent all principal sectors of the U.S. economy. ECAT was founded more than three decades ago to promote economic growth through expansionary trade and investment policies. Today, the annual sales of ECAT companies total nearly \$2.4 trillion, and the companies employ approximately five and a half million persons.

Global Investment and U.S. National Security

All too often, the recent debate over the effort to reform the foreign investment review process of the Committee on Foreign Investment in the United States (CFIUS) poses a false choice – the choice between preserving national security and welcoming foreign investment. In fact, the United States' national security is strengthened by promoting a vibrant economy and economic growth here at home

and abroad, which in turn are fostered by foreign investment into the United States, as well as U.S. investment abroad.

Foreign investment inflows into the United States are a major source of U.S. economic growth. Foreign investment in the United States promotes U.S. exports, economic and employment opportunities and productivity. Based on the most recent data from the Bureau of Economic Analysis, majority-owned U.S. affiliates of foreign companies with operations in the United States employed 5.4 million U.S. workers, accounting for nearly five percent of total U.S. employment in private industries.

U.S. foreign investment outflows are also critically important to supporting growth in the U.S. and global economies. Over the past 20 years, U.S. companies that invest abroad have:

- exported more (accounting for one-half to three-quarters of all U.S. exports)
- expended more on U.S. research and development and physical capital investments, and
- paid their U.S. workers more

than companies not engaged globally. Foreign affiliate sales of U.S. companies invested abroad amount to approximately \$2 trillion, which help to support jobs and business activities in the United States. More than 70 percent of the profits earned by such affiliates are returned to the United States. Moreover, U.S. investment abroad is essential to supporting access to natural resources, as well as the economic growth in foreign countries that is very important, albeit not sufficient, to support stability overseas. In short, U.S. foreign investment is critical for supporting U.S. economic growth and a higher standard of living here in the United States and abroad.

Continued foreign investment in the United States and its corollary, U.S. investment abroad, require policies that support and protect foreign investment.

Importance of a Strong, Credible, Objective and National-Security-Focused Review Process

CFIUS plays an important role in ensuring that the United States continues to welcome investment, and its reform makes sense to ensure a credible, objective and strong process focused on national security. As enunciated by ECAT and several other leading business organizations in March 2006, there are a number of key principles to maintain in reforming and improving the CFIUS process, including ensuring that the national security review process is:

- Objective, fact-based and analytically rigorous.
- Focused on national security issues.
- Promoting the full use of sensitive and classified information, while protecting the confidential information of the parties from public disclosure.
- Operating on a case-by-case basis and remaining sufficiently flexible to cover new national security issues as they arise.
- Operating in a timely manner.
- Not a substitute for other more targeted and effective tools to protect U.S. national security.

I would like to highlight two key issues. The first is the need to ensure that limited CFIUS resources are directed at potential transactions that raise national security issues. To do otherwise, could overwhelm the CFIUS process, diverting resources from the transactions that require the most attention. Requiring mandatory investigations of certain types of transactions, regardless of any potential national security issues raised, simply does not guarantee greater protection for national security; in fact it may lead to the opposite result.

The second is to consider potential changes to the U.S. national security review process in light of how such an altered process would impact U.S. investors abroad if similar changes were adopted by foreign governments. Indeed, foreign governments are very closely monitoring Congressional action on CFIUS. Changes that would politicize the process or move beyond a national-security-focused

review may encourage other countries to adopt similar provisions and deny U.S. companies access to key investment areas that are important for our economy, from resources to infrastructure to key service sectors.

The full set of principles is appended to my testimony.

H.R. 5337 Makes Important Reforms to Improve the CFIUS Process

ECAT believes that H.R. 5337 makes important improvements to the CFIUS process in ways that reflect the principles described above. In particular, H.R. 5337 would:

- Strengthen the CFIUS process and enhance its credibility by providing greater clarity to its role and operation.
- Improve the integrity of the process by ensuring intelligence and other information is fully considered.
- Enhance the role of the Director of National Intelligence and the ability of CFIUS to review intelligence reports.
- Improve CFIUS' oversight by requiring reviews and monitoring of mitigation and assurance agreements, as well as of transactions for which notice has been withdrawn, and reconsideration of transactions where there has been a breach of the mitigation agreement.
- Ensure time-limited, fact-based and objective reviews of notified transactions.
- Improve the protection of confidential and proprietary information.
- Enhance the Congressional notification system.

Overall, H.R. 5337 would establish a strong framework for CFIUS to review, make decisions and notify Congress on the national security implications of foreign investments. ECAT welcomes the work of all of the bill's sponsors in carefully crafting this legislation in a way that emphasizes an objective, timely and fact-based process that promotes national security objectives, while promoting

continued support for investment here in the United States. In so doing, H.R. 5337 would support the open investment climate that the United States has long fostered and set a positive example for foreign governments that have or may institute their own investment reviews, which is important for U.S. companies that invest abroad to the benefit of the United States.

Improvements are always possible in any piece of legislation. To that end, ECAT welcomes the work done by the Committee on Financial Services to improve several aspects of this legislation and looks forward to working with you and your colleagues in the House and the Senate in support of the strongest possible legislation. Areas where additional work could be beneficial include:

- Enhancing the case-by-case analysis, rather than requiring mandatory investigations for certain types of acquisitions. Alternatively, where investigations are mandated, it should be clarified that the investigation should begin immediately and not wait for a distinct review process.
- Avoiding transaction-by-transaction notifications that could lead to the potential politicization and undermining of the process.

As Congress' review continues, ECAT is concerned by a variety of other CFIUS reform proposals that would set back, rather than advance, the reform effort represented by H.R. 5337. Therefore, ECAT urges that potential modifications to this legislation maintain the key improvements incorporated by the bill's sponsors and avoid proposals that would:

- *Overwhelm the CFIUS process.* In particular, proposals that would drastically alter or expand the scope of mandatory CFIUS investigations, regardless of a national security nexus, should be avoided. Subjecting significant numbers of transactions to review and investigation would not only waste valuable government resources, it would take away the valuable time of government agencies to focus on the actual transactions that have potential national security implications.

- *Effectively downgrade the use of sensitive, classified and business confidential information* in the review process through *per se* judgments based, for example, on nationality or the views of persons without sufficient access or ability to review such information.
- *Politicize the process*, which potentially would subject U.S. investors overseas to subjective, politicized investment review processes, resulting in the denial of U.S. investments that promote stability, economic growth and access to critical resources and infrastructure - harming thereby U.S. national security.
- *Chill foreign investment* in the United States and deny, as a result, significant economic opportunities to Americans who benefit substantially from foreign investment in the United States.

Conclusion

I welcome the opportunity to present the views of ECAT today with regard to the national security investment review process and, in particular, the reforms made by H.R. 5337. I look forward to your questions.

**BUSINESS ROUNDTABLE
COALITION OF SERVICE INDUSTRIES
EMERGENCY COMMITTEE FOR AMERICAN TRADE
NATIONAL ASSOCIATION OF MANUFACTURERS
NATIONAL FOREIGN TRADE COUNCIL
ORGANIZATION FOR INTERNATIONAL INVESTMENT
U.S. CHAMBER OF COMMERCE
UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS**

**PRINCIPLES TO GUIDE NATIONAL SECURITY REVIEWS
OF FOREIGN INVESTMENT**

March 13, 2006

Presidential authority to review foreign acquisitions in the United States, authorized by section 721 of the Defense Production Act (the so-called Exon-Florio amendment), represents an extremely important tool to protect U.S. national security. It provides wide authority to the President to investigate foreign acquisitions, authority delegated to the Committee on Foreign Investment in the United States (CFIUS), and to suspend or prohibit foreign acquisitions of U.S. companies where the foreign entity might take action that threatens U.S. national security.

Numerous proposals have been made to modify the U.S. national security investment review process. We recognize the desire of many in Congress to improve the process. It is critical, however, that the strengths of the current process and other U.S. national security priorities not be undermined through hasty and ill-conceived reform efforts. As the Administration and Congress consider proposals to reform the Exon-Florio structure, we urge that the following principles be used as a guidepost to evaluate all proposals.

Principle 1: It is appropriate for foreign investment in the United States that might affect U.S. national security to be subject to special review by the President and Executive Branch government agencies that are designated. The current Executive Branch national security review process, chaired by Treasury, represents an appropriate mix of security, diplomatic, trade and investment agencies, which is critical to ensure that governmental officials with needed expertise can examine the potential implications of proposed acquisitions and require appropriate special conditions as needed.

Principle 2: The national security investment review process must be objective, fact-based and analytically rigorous. These attributes are critical to ensure that national security interests are fully and properly protected – the ultimate purpose of the review process. The review process must include advice of government agency experts in the relevant fields. Confidence in the national security investment review process will not be strengthened by proposals that undermine the objectivity of the current process. Furthermore, altering the basic objective process will encourage other countries to impose unjustified and unreasonable barriers to U.S. investments abroad – investments that support economic growth and access to resources and, in turn, U.S. national security. Such a result would harm U.S. economic and job growth and national security interests.

Principle 3: The national security investment review process must be focused on national security issues. “National security” is a broad and flexible term that places no limits on the examination of relevant transactions. It may be counterproductive to redefine the scope of the investment review process, which actually could limit the issues that the U.S. government can review. It may also encourage other countries to adopt similar provisions and deny U.S. companies access to key investment areas that are important for our economy, from resources to infrastructure to key service sectors.

Principle 4: The national security investment review process must promote the full use of sensitive and classified information, including protecting the confidential information of the parties from public disclosure. The ability of the U.S. government to review fully and make accurate assessments of the national security implications of foreign acquisitions requires in many, if not all, cases, reliance on sensitive, classified and confidential business information. The ability of the U.S. government to continue to make the most effective use of such information must not be undermined by requiring public disclosure of sensitive, classified or confidential business information.

Principle 5: The national security investment review process must operate on a case-by-case basis and be sufficiently flexible to cover new national security issues as they arise. Given the complexity and changing nature of national security issues, it would be counterproductive to establish a process to promote uniform outcomes in all investigations and reviews. Analyses should be focused on the facts of a particular transaction and not be focused on fitting transactions in a particular box with a pre-determined outcome. In the same way, it is also important for the President to maintain sufficient flexibility to deal with changing national security concerns.

Principle 6: The national security investment review process must operate in a timely manner. The United States is a major destination for foreign investment that is vital to promoting productivity, employment and growth in the United States. Given that most foreign investments do not affect in any way U.S. national security interests, it is very strongly in the U.S. interest to continue to maintain a time-limited process whereby initial decisions can be made with further review available where warranted.

Principle 7: The national security investment review process must not become a substitute for other more targeted and effective tools to protect U.S. national security. While an important tool, the national security investment review process is by no means the only, or even primary, tool of the U.S. government in ensuring national security. For example, the Department of Defense administers an extensive industrial security program designed specifically to protect assets critical to the U.S. defense infrastructure. There are also specific programs already in place to protect the security of our ports. The Coast Guard, U.S. Customs and Border Protection and other units of the U.S. Department of Homeland Security run security at our nation’s ports and already require all companies, domestic or foreign, to abide by security and other regulations. The U.S. Government should use the most effective tool to address specific national security concerns.